



BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 200321-0084]

RIN 0648-BJ70

Extension of Emergency Measures to Address Fishery Observer Coverage During the Coronavirus Pandemic

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; emergency action extended.

SUMMARY: NMFS extends this temporary rule (also referred to herein as “emergency action”) to provide it with authority to continue to waive observer coverage requirements.

NMFS is taking this action to address public health concerns relating to the ongoing Coronavirus pandemic. The intended effect is to provide the waiver mechanism necessary to respond to the ongoing public health emergency. This action also authorizes NMFS to waive some training or other program requirements to ensure that as many observers are available as possible while ensuring the safety and health of the observers and trainers.

DATES: The expiration date of the emergency measures to address fishery observer coverage during the Coronavirus pandemic published on March 27, 2020 (85 FR 17285) is extended through *[insert date 186 calendar days after date of publication in the FEDERAL REGISTER]*.

FOR FURTHER INFORMATION CONTACT: Michael Ruccio at 978-281-9104.

SUPPLEMENTARY INFORMATION:

Background

On March 27, 2020, NMFS published an emergency action (85 FR 17285) that addresses public health concerns relating to the Coronavirus Disease pandemic that began in 2019 (COVID-19). The emergency action provides NMFS with authority to waive observer coverage requirements established in regulations promulgated under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and other statutes, consistent with applicable law and international obligations. The action also authorizes NMFS to waive some training or other program requirements to ensure that as many observers are available as possible while ensuring the safety and health of the observers and trainers. Due to the continuation and evolution of the COVID-19 pandemic, NMFS is now extending this emergency action for an additional 186 days, as authorized under MSA section 305(c)(3).

The background for why the emergency observer waiver is necessary was provided in the original emergency action (85 FR 17285; March 27, 2020) and is not repeated here. Given the ongoing COVID-19 pandemic, the continued national and local declarations of emergency, and guidance from the Centers for Disease Control and Prevention, NMFS has determined that an extension of the emergency action is needed to enable NMFS to continue to waive observer coverage and some related training and other program requirements. NMFS expects this extension to advance the protection of and to promote public health and the safety of fishermen, observers, and other parties that may come in contact with those persons. NMFS will continue to consider applicable law and international obligations when making decisions about observer coverage waivers. In

issuing such waivers, NMFS will continue to carefully monitor the status of the fishery and/or protected species that were being observed or monitored to ensure that the relevant conservation and management goals are still being met. If needed to address any significant issues or concerns, or if NMFS determines that a waiver cannot be issued (*e.g.*, observer coverage is required due to other applicable law or international obligations), NMFS may implement additional, separate actions (*e.g.*, fishery closures, additional monitoring) per existing regulations or may issue emergency regulations, as necessary and appropriate. As a result, no ecological or socioeconomic impacts are expected by this temporary rule beyond any caused by the COVID-19 pandemic itself.

NMFS will continue to monitor and evaluate the COVID-19 pandemic and will take additional action if needed. Unless otherwise determined, NMFS anticipates that these emergency measures will be effective until the earlier of the following dates: (1) the date when the current COVID-19 pandemic is no longer deemed a public health emergency by the Secretary of Health and Human Services; or (2) *[insert date 186 calendar days after date of publication in the FEDERAL REGISTER]*, *see* MSA section 305(c)(3)(B), 16 U.S.C. 1855(c)(3)(B). As warranted, if this emergency continues beyond the end of this 186-day extension period, NMFS may consult with the Secretary of Health and Human Services about a further extension of this emergency action pursuant to MSA section 305(c)(3)(C) or may conduct a more permanent rulemaking.

Extended Emergency Management Measures

NMFS is extending the original emergency regulations with a minor change to the text of the first criteria for waiving observer coverage. Changes in text are to clarify the

original intent and do not change the meaning. The management measures in the emergency rule that are being extended follow.

Under this emergency action, NMFS may waive observer coverage requirements if:

- Placing an observer conflicts with travel restrictions or other requirements addressing COVID-19 related concerns issued by local, state, or national governments, or the private companies that deploy observers pursuant to NMFS regulations; or
- No qualified observer(s) are available for placement due to health, safety, or training issues related to COVID-19.

If either of these conditions is satisfied, then NMFS may waive observer coverage requirements for an individual trip or vessel, an entire fishery or fleet, or all fisheries administered under a NMFS Regional Office (*see* 50 CFR 600.10 (defining Region) and <https://www.fisheries.noaa.gov/regions>) or NMFS Headquarters Office. However, waivers will be only issued as narrowly as possible in terms of duration and scope to meet the particular circumstances. Such waivers will be communicated in writing or electronic format. At any time, if the circumstances for a waiver are no longer applicable, NMFS will withdraw, in writing or electronic format, that waiver. In making decisions regarding observer coverage waivers, NMFS will gather information, if needed, from relevant observer service providers and other parties involved with observer coverage before issuing the waivers.

This emergency action also allows NMFS to waive certain observer training and other observer program requirements (*e.g.*, requiring a minimum class size or requiring

that observers transfer to other vessels between trips). Before doing so, NMFS will ensure that any such waiver does not remove requirements that ensure the health and safety of the observer or observer trainer.

Response to Comments

During the comment period on the emergency rule, we received 29 written comments from a variety of stakeholders including Regional Fishery Management Councils (Councils), commercial fishermen, fishing stakeholder organizations, nongovernmental environmental organizations, and other interested parties. Three of the comments we received were not related to this rule and are thus not included in the responses provided below. Similarly, we do not provide responses to feedback on implementation of the CARES Act (The Coronavirus Aid, Relief, and Economic Security Act) as this is also outside the scope of this rule. A summary of the major issues raised is provided below.

Comment 1: All responsive comments NMFS received were generally in support of waiving observer coverage. Many commenters noted the need for high quality fisheries dependent data, and supported the agency's efforts to collect such data through observers.

Response: NMFS appreciates and agrees with these comments. NMFS acknowledges that it is facing an unprecedented situation with observer and monitor deployment and the ongoing COVID-19 pandemic and public health mandates. Also, NMFS recognizes that there is a need for flexibility to balance the ongoing public health concerns and the need to continue to collect fishery-dependent data.

Comment 2: NMFS received comments that observers are not essential, and that the emergency rule does not provide sufficient protections for fishermen nor does it ensure the safety of the crew. Many of these commenters believe the close quarters on fishing vessels would mean the virus could spread to entire crews and their families. Some commenters felt the lack of protection for the crew would put the entire food supply in jeopardy.

Response: NMFS disagrees. Observers and monitors, at-sea and shoreside, are an essential component of commercial fishing operations. Observers provide important fishery-dependent data, which are used to understand catch, bycatch, and interactions with species protected under the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA). Observers also collect biological information that may not otherwise be collected.

On August 18, 2020, the U.S. Department of Homeland Security released updated guidance on essential critical infrastructure workforce during COVID-19. Seafood harvesting facilities are listed as part of food manufacturer workers and their supplier workers. In addition, the memo states that those workers include "Animal agriculture workers ... employed in ... animal production operations ... and associated regulatory and government workforce." As the agency charged with conservation and management of Federal fisheries, NMFS asserts that fisheries observers are an associated government workforce necessary for fisheries because they provide important data for science-based fisheries management.

In general, observers create no more risk than a crew member, and observer provider companies are generally able to match precautionary measures that the vessels

impose on crew members. Within our regulatory and contract oversight authority, NMFS's goal is to have observer providers and their observers and monitors meet or exceed the risk mitigation protocols that have been adopted by fishermen.

Comment 3: NMFS received multiple comments concerned with inconsistencies on the issuance of waivers between regions.

Response: The fisheries of the United States are highly variable; ranging from large catcher-processor boats targeting pollock in the Bering Sea to small fishing boats targeting multi-species fisheries in the Caribbean. Fisheries vary not only in the species targeted and fishing methods used, but also in their goals, objectives, and operating procedures. In addition, there are and continue to be regional differences in the occurrence of COVID-19 cases and restrictions on travel. NMFS decisions on observer waivers are dependent on the unique conditions of each program. The operational aspects of some fisheries have allowed the agency and observer service providers to more quickly adapt processes and procedures for deployment. In other cases, more time has been needed. For example, in the Northeast, because of the number of different jurisdictions, additional time was needed to finalize observer redeployment protocols. Consequently, resumption of observer coverage was delayed for an additional month. Overall, NMFS' approach to observer coverage and monitoring allows it to be as adaptable as possible given all of the variability across our regions and fisheries.

Comment 4: NMFS received comments from a number of fishing organizations that stated NMFS should modify the emergency rule to allow waivers to protect the health and safety of fishery participants and observers, and not just when an observer was unavailable.

Other comments on health and safety protection varied. There were comments that carrying observers is in conflict with or inconsistent with local or state social mandates or guidance for things such as shelter-in-place orders. Commenters stated that in such situations, NMFS should be responsible for ensuring observer deployments comply with such mandates. One comment stated that vessel insurance carriers are opposed to allowing observers to interact with vessel personnel until the pandemic is better understood and the rate of infection is under control. Commenters also noted concerns about the age of most fishery participants, existing health conditions, and the need to adhere to National Standard 10 of the MSA (safety at sea).

Response: The March 2020 emergency rule provides the ability to waive observer coverage to protect the health and safety of fishery participants and observers. With this rule we have revised the first criteria to increase clarity while retaining the original meaning. NMFS may waive observer coverage requirements if one of the below conditions is met:

- Placing an observer conflicts with travel restrictions or other requirements addressing COVID-19 related concerns issued by local, state, or national governments, or the private companies that deploy observers pursuant to NMFS regulations; or
- No qualified observer(s) are available for placement due to health, safety, or training issues related to COVID-19.

NMFS also clarifies that it will consider a trip waiver if the observer providers cannot meet the risk mitigation protocols imposed by a state on commercial fishing crew or by the vessel or vessel company on its crew. Based on our regulatory and contract

oversight authority, NMFS intends to ensure that observer providers and their observers and monitors are following the same risk mitigation protocols that fishermen are following.

The decision to operate rests ultimately with each individual vessel captain. *See* 50 CFR 600.355 (National Standard 10 guidelines clarify that the safety of a vessel and the people aboard is ultimately the responsibility of the master of that vessel). It is our position that observers do not introduce additional risk when compared to fishing crew when the observer, and their employer, take identical or more stringent risk mitigation protocols. In the circumstance where an observer provider cannot meet the risk mitigation protocols imposed by a state on commercial fishing crew, or those taken by the vessel or a vessel company for its crew, NMFS will consider a waiver on a trip-specific basis.

The National Standard 10 guidelines (50 CFR 600.355) set forth safety considerations (*e.g.*, weather patterns, gear and loading requirements, etc.) and possible mitigation measures (*e.g.*, avoiding hazardous weather, avoiding race-to-fish 'derby' fisheries, tailoring gear requirements, spreading effort over time and area, etc.). While the guidelines do not address the current, unprecedented situation, NMFS believes the emergency rule and its extension are consistent with National Standard 10. The rule provides continued operational flexibility for vessel masters to establish overall risk mitigation protocols for their vessels, ensuring that observers meet or exceed the same standards established for the vessel in question. In situations where observer providers cannot meet the vessel specific risk mitigation protocols established or where observers are otherwise unavailable, NMFS will continue to consider waivers of observer coverage.

Comment 5: NMFS received multiple comments that NMFS should have issued more comprehensive guidance on when fishing and associated activities are safe and compatible with public health rules.

Response: As mentioned in response to Comment 3 above, there is high variability across fisheries in the operational components of fisheries (*e.g.*, gears, boat sizes, locations, methods, etc.) as well as observer or monitor coverage rates. NMFS has determined that comprehensive guidance on fishing activities is thus not appropriate nor manageable.

Comment 6: NMFS received comments that NMFS should not relax the training requirements for observers. Some of these commenters felt that the current level of training is not sufficient as newly trained observers are not always prepared for the difficult conditions at-sea and sending out observers without proper training endangers fishermen and their families. Commenters suggested training may need to be longer to include information related to COVID-19 safety. One commenter noted that bad data was worse than no data. Other commenters stated that NMFS should work with regional partners to determine what training needs could be waived without sacrificing the data that needs to be collected.

Response: NMFS agrees that sufficient training of observers is necessary. NMFS will ensure that any waivers related to training do not remove requirements that ensure the health and safety of the observer, fishing captain, or crew.

Comment 7: NMFS received a number of comments regarding the lack of a specific waiver length prescribed in the emergency rule. Some commenters indicated that any length of time for a waiver of observer coverage was welcome. Other commenters

indicated that NMFS should issue blanket waivers that stop all observer coverage for significant periods of time including 90 days, 120 days, or for the rest of 2020.

Response: Waivers for all fisheries administered under a Regional Office were granted in many regions during the beginning of the COVID-19 pandemic while NMFS, observer providers, and fishing businesses explored the appropriate safety requirements. Moving forward, NMFS anticipates broadly applicable waivers will likely not be needed. On a regionally-decided, case-by-case basis, individual trip waivers can be granted per the conditions described in the response to Comment 4. This emergency rule extension is in effect through [*insert date 186 calendar days after date of publication in the FEDERAL REGISTER*]. If necessary, NMFS will consider a further extension. *See* 16 U.S.C. 1855(c)(3)(C) (responding to public health emergency).

Comment 8: NMFS received multiple comments suggesting other management changes NMFS should make in response to the COVID-19 pandemic related to either safety or sustainable management. Multiple commenters noted that NMFS should consider decreasing catch limits to account for the increased uncertainty and increased bias in the self-reported data due to the lack of observer data. One commenter requested NMFS temporarily suspend area-based management measures during the pandemic to decrease time spent on the boat and in close-quarters, and to decrease economic hardships. Another commenter suggested revising the observer duties to remove duties that require prolonged interactions (*e.g.*, measuring net width, extensive economic questions). Other comments included requests to: Increase the availability of protective equipment for crew, adjust post-deployment procedures so that observers do not need to travel to complete their debriefings, minimize the number of people on docks, and to

focus on fishing that is essential for food security. In addition, commenters suggest NMFS should find other lawful avenues for protecting fishery livelihoods and should keep supply chains safe and reliable.

Response: Many of the requested actions are currently outside the scope of this action which is to provide authority to waive observer coverage requirements. We appreciate the ideas suggested and encourage commenters to contact their NMFS regional office and/or work with their Councils to suggest these changes.

NMFS regional offices and science centers, working collaboratively with Councils will consider how the decrease in fishery-dependent data will impact future stock assessments and will make adjustments on a fishery-by-fishery basis, as needed. Catch advice for many stocks is provided on a multi-year basis such that advice for 2021 and potentially beyond has already been discussed and catch limits established through council processes. Many Councils have a robust risk assessment process that can and will evaluate the potentially increased uncertainty that may arise from decreased fishery dependent data. Finally, there is significant expertise within NMFS science centers and on the council's scientific and statistical committees and with council technical staff to provide analysis and advice on if or by how much catch advice should be modified in response to fishery dependent data gaps, changes in overall fishing effort and harvest, or both.

Comment 9: NMFS received numerous comments that the agency must maintain its ability to meet conservation and management mandates under MSA, ESA, the Migratory Bird Treaty Act, and the MMPA, and ensure that any waiver issued is consistent with these conservation requirements. Commenters suggested NMFS look at

the role of observers within each fishery when determining if observer coverage can be waived, and that the Secretary may exercise his authority to uphold conservation needs and safety at sea by temporarily shutting down fishing activities. Finally, one commenter noted that NMFS cannot assume removal of observers will have no ecological impacts.

Response: NMFS is committed to maintaining the sustainable use of our marine resources, protecting endangered species, marine mammals, and seabirds, and providing seafood to the country during the ongoing COVID-19 pandemic. NMFS does not agree that it is necessary to temporarily shut down a fishery due to a short-term reduction in the number of trips observed.

NMFS will continue to consider applicable law (*e.g.*, ESA and other statutes noted above) and international obligations when making decisions about observer coverage waivers. In issuing such waivers, NMFS will carefully monitor the status of the fishery and/or protected species that were being observed or monitored to ensure that the relevant conservation and management goals are still being met. If needed to address any significant issues or concerns, or if NMFS determines that a waiver cannot be issued (*e.g.*, observer coverage is required due to other applicable law or international obligations), NMFS may implement additional, separate actions (*e.g.*, fishery closures, additional monitoring, etc.) per existing regulations or may issue emergency regulations, as necessary and appropriate. As a result, no ecological or socioeconomic impacts are expected by this extension beyond any caused by the COVID-19 pandemic itself.

Comment 10: Some commenters indicated a concern that vessel owners/operators would not have control when allowing observers onboard their vessels, and that they may be required to carry observers even if the observer was symptomatic. One commenter

asked if a vessel operator could refuse to carry an observer if the observer was symptomatic.

Response: NMFS agrees and remains concerned about health of both fishermen and observers. Observer provider companies have developed protocols that are generally able to match or exceed risk mitigation measures that the vessels and fishing companies impose on crew members and that help ensure health of both observers and fishery participants. Under these protocols, it is highly unlikely that a symptomatic observer would be deployed. However, in that unlikely scenario, the vessel in question should work with both the observer provider and regional observer program and/or regional office to address the situation. Ultimately, NMFS's goal is to have observers and monitors following the same or more stringent risk mitigation protocols than fishermen are following.

Comment 11: NMFS received comments concerning the economic implications of continuing to require observer coverage. Commenters indicated the daily operational costs coupled with the loss of revenue could be heavily impactful on some of the fisherman and associated business. One commenter asked who is liable if an observer passes the virus to the persons on a fishing vessel, and whether the agency would be willing to pay for time lost fishing as a result. Commenters indicated that NMFS should further evaluate the sociological conditions of each fleet before determining the efficacy of an observer waiver. Commenters suggested the impacts of continuing observer coverage during the pandemic could further exacerbate the economic decline of the fishing industry.

Response: NMFS is concerned about the economic impacts of the COVID-19 pandemic on the fishermen, fishing fleets, and fishing communities. NMFS continues to conduct ongoing evaluation of the economic impacts resulting from the pandemic and has routinely provided this information to Congress as it works to relieve the economic impacts of the pandemic. As previously mentioned, observer provider companies have developed protocols to minimize the risk of deploying observers or monitors. In addition, this rule provides for consideration of waivers when observers/monitors cannot meet the risk mitigation protocols in place on a vessel, as implemented by the captain and crew, or state. *See* response to Comment 4. Observer provider protocols, vessel protocols, and the waiver criteria in this rule ensure that risks to fisheries participants and observers/monitors are minimized. Because the decision to operate rests with each individual vessel captain, NMFS would not pay for any lost fishing time in the unlikely event that a vessel crew or captain's contraction of COVID-19 could be traced to an observer or monitor. NMFS notes that the Federal government has sovereign immunity (*i.e.*, cannot be sued), unless it specifically waives that immunity. Sovereign immunity has not been waived for claims related to compliance with regulatory requirements.

Comment 12: NMFS received multiple comments noting that the rule does not place enough emphasis on the health of fishing communities, including the ability of small fishing communities to handle a large number of COVID-19 infected patients. Commenters noted the need for NMFS to focus on minimizing economic impacts to fishing communities and suggested NMFS consider other management actions to protect these communities.

Response: NMFS is concerned with the health and safety of U.S. fishing communities. We understand that medical capabilities and hospital infrastructure varies across communities. We emphasize that observers do not introduce more risk than fishing crews for the spread of COVID-19 when following identified risk mitigation protocols. For remote communities where access to travel and lodging are reduced due to the ongoing COVID-19 pandemic, the emergency rule and its extension allow for consideration of observer coverage waivers due to the lack of available observers. Fishing businesses are urged to be in communication with their respective observer provider and NMFS regional observer program/regional office to discuss further, as needed.

Comment 13: Two commenters stated that NMFS should follow the “proper procedure for emergency action.” Specifically, they state NMFS must publish the details of each waiver issued in the **Federal Register**. The commenters suggested that this process would mean the agency should request public comment when observer requirements are potentially waived for each fishery.

Response: NMFS adopted the emergency rule and this extension pursuant to the procedure for emergency regulations under MSA section 305(c). The quickly evolving nature of this unprecedented pandemic requires a nimble response to local conditions through issuance of temporary, region-specific, vessel-specific, or trip-specific waivers.

Comment 14: NMFS received a number of comments recommending the use of electronic monitoring (EM) in place of at-sea observers. Some of these commenters indicated that they believed that fisheries with fully implemented programs EM could replace the catch accounting provided by at sea observers. Furthermore, commenters

stated that fisheries with pilot EM programs should be temporarily expanded to include additional vessels to allow for monitoring without at-sea observers. Further comments stated that all fisheries with EM capabilities should require EM when observers are waived. Some commenters indicated that EM could include vessel monitoring systems (VMS), Automatic Identification Systems (AIS), video cameras, and electronic logbooks. These commenters indicated that using these technologies could fill data gaps, and some of the commenters suggested increasing the “ping” rate for VMS among other modifications to increase EM coverage overall. Two commenters also suggested that electronic reporting by fishermen and dealers should be required in any fishery issued a waiver to assist in mitigating any data gaps resulting from no observer coverage.

Response: NMFS is very supportive of expanding EM and electronic reporting (ER). NMFS has provided approximately \$42 million since 2015 to develop and implement EM and ER technologies; there are seven EM programs in regulation (six in Alaska and the Atlantic Highly Migratory Species program), seven more EM programs in pre-implementation (Alaska, West Coast, and Northeast) and a wide-range of pilot projects across U.S. fisheries. Where implemented in regulation, EM continues to be used to gather fishery dependent data during this pandemic. However, under the best conditions, developing and expanding EM programs still requires resources to purchase and install systems, develop vessel-specific monitoring plans, transmit and review data, and map out the pathway for integrating and using the data for management and science. NMFS agrees that the COVID-19 pandemic highlights the benefits of EM, especially to make our data collection and monitoring more resilient, and expects to see an increased interest and use of EM in the future. However, given the challenges with EM listed

above, NMFS' ability to approve new EM programs or provide EM to more boats is limited at the current time. NMFS will continue to work with existing projects and programs to determine where EM expansion can occur in the short-term and will continue to work with the Councils to improve our monitoring programs, including the expansion of EM and ER.

Comment 15: NMFS received comments indicating that proper catch accounting is a necessity for quality fisheries management, but that it can be achieved without the use of observers. These commenters stated that electronic dealer reporting is the gold standard in quota monitoring and catch accounting, and that NMFS already uses this data stream for real-time fisheries management. Since NMFS uses other reporting methods for catch accounting, quota management and real time fisheries management, these commenters believe that NMFS can grant a long-term observer waiver without long term impacts to fisheries. A separate commenter noted the need to substitute other data collection and monitoring methods in lieu of observer data. Another commenter noted that there was not a need for both 100 percent observer coverage and 100 percent dock-side monitoring.

Response: NMFS agrees that catch accounting is an important part of sustainable fisheries management. However, NMFS notes that fishery management plans adopt data collection and reporting requirements (*e.g.*, fishery observers, dealer reporting, etc.) to address not only catch accounting but other purposes. NMFS anticipates that broadly applicable waivers of observer coverage will likely not be needed, and waivers should be granted on a regionally-decided, case-by-case basis depending on the fishery (see response to Comment 3).

Comment 16: NMFS received multiple comments pertaining to when waivers should be lifted. Some commenters indicated that any waiver issued must be limited in scope and duration. Other commenters felt any waivers should remain in place until all travel restrictions and other social control mechanisms have been removed from the regions where observers are deployed or until testing availability increases substantially or a vaccine becomes available. Other commenters indicated that the rationale for deploying observers should be tied to the same rationale for reopening NOAA offices and bringing employees back to work sites. Finally, a commenter suggested the waiver should match the duration of the shelter-at-home orders of the various governors or local governments.

Response: As mentioned in response to Comment 3, the ability to re-deploy observers depends on the operational components of the fisheries (*e.g.*, gears, methods, port of departure, mandated observer coverage levels, etc.) as well as the availability of observers and the ability of observer providers to at least match the deployment vessel's self-imposed risk mitigation protocols. NMFS agrees that observers should follow local travel restrictions and stay at home orders that apply to essential employees. NMFS does not agree that observer coverage and related requirements should be waived until NOAA offices are open. Observer work cannot be completed via telework. In analogous situations where NMFS employees' work cannot be completed remotely, NMFS is allowing the return of essential workers to NOAA facilities, consistent with state and local public health service guidance.

Comment 17: Two commenters indicated that NMFS should consider the economic and biological ramifications of waiving observer coverage focused on ESA or

MMPA species. Commenters noted that self-reporting is insufficient for these species, especially in situations where incidental take statements are present for interactions with ESA species. They indicated that waivers that do not offer sufficient coverage under the ESA could leave fishermen vulnerable to section 9 liability (section 9 states it is illegal to take, possess, or sell any species protected under the ESA) at the same time that fishermen are facing a significant reduction in demand and prices. Another commenter noted that in some fisheries the observers assist fishing vessel captains in marine mammal avoidance and that this role cannot be replaced with logbooks.

Response: NMFS does not agree that waiving observer requirements will impact ESA section 9 liability. Fishermen should be employing the same fishing practices with or without observers on-board and thus the section 9 liability should remain the same. NMFS will consider ESA obligations when making decisions about observer coverage waivers. In issuing such waivers, NMFS will carefully monitor the status of the protected species that were being observed or monitored to ensure that the relevant conservation and management goals and any applicable (or associated) requirements are still being met. If needed to address any significant issues or concerns, NMFS may implement additional, separate actions (*e.g.*, fishery closures, additional monitoring) per existing regulations or may issue emergency regulations, as necessary and appropriate.

Comment 18: NMFS received comments that waivers should not be issued for fishing under exempted fishing permits.

Response: NMFS will consider the impact of waiving observers for exempted fishing permits on a case-by-case basis. Waivers are expected to vary depending on the goals and nature of the fishing activities and details of the exempted fishing permits. For

example, permits related to the use of electronic monitoring could continue without observers, or with observers based only shoreside, as information on catch is still being collected.

Comment 19: NMFS received multiple comments noting that the United States is a party to many different international agreements that require observer coverage. They state that unless an international body waives its observer coverage requirements, NMFS must ensure individual waivers comply with international observer requirements within the relevant convention waters.

Two commenters requested a waiver for the international purse seine fishery. They indicated that several international agencies have granted temporary allowances to allow for the relevant fisheries to operate without observers as a result of the pandemic, and urge NMFS to waive observer coverage fully for the relevant fisheries. They note fishermen could experience economic harm if they are prohibited from fishing when observers are not available. They also note concern that these emergency measures will be lifted by NMFS on “The date when the current COVID -19 pandemic is no longer deemed a public health emergency by the Secretary of Health and Human Services.” They state that the condition of the pandemic in the United States may not match the conditions internationally.

Response: NMFS understand these concerns, is assessing conditions around international fisheries, and is waiving observer coverage where appropriate.

Classification

This action is issued pursuant to section 305(c) of the MSA, 16 U.S.C. 1855(c), and pursuant to the rulemaking authority under other statutes that apply to Federal

fisheries management or that implement international agreements. Such statutes include, but are not limited to, the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*), South Pacific Tuna Act of 1988 (16 U.S.C. 973 *et seq.*), Western and Central Pacific Fisheries Convention Implementation Act (16 U.S.C. 6901 *et seq.*), Antigua Convention Implementing Act (16 U.S.C. 951 *et seq.*), High Seas Fishing Compliance Act (16 U.S.C. 5501 *et seq.*), and MMPA (16 U.S.C. 1361 *et seq.*). This temporary rule is intended to authorize NMFS to waive any observer requirement implemented under any of those authorities, consistent with other applicable law. Consistent with MSA section 305(c)(3)(B), this action will remain in effect as to all such requirements for 186 days (366 days from the original rulemaking) (unless, prior to these dates, the current COVID-19 pandemic is no longer deemed a public health emergency by the Secretary of Health and Human Services, in which case NMFS anticipates that a notice of termination of this temporary rule would be filed in the **Federal Register** pursuant to MSA section 305(c)(3)(D)). If this emergency needs to be extended beyond that time, or if this public health emergency evolves to the point where it is deemed necessary, NMFS will consult with the Secretary of Health and Human Services, pursuant to MSA section 305(c)(3)(C), to seek the Secretary's concurrence on extending the action until the circumstances that created the public health emergency related to COVID-19 no longer exist.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause under 5 U.S.C. 553(b)(B) of the Administrative Procedure Act (APA) that it is unnecessary, impracticable, and contrary to the public interest to provide for any additional prior notice and opportunity for the public to comment. As more fully explained above, the reasons justifying promulgation of this rule on an emergency basis, coupled with the fact that the

public has had the opportunity to comment on the original emergency rule, make solicitation of additional comment unnecessary, impractical and contrary to the public interest. This action is needed immediately to enable NMFS to continue to respond to evolving, public safety-related concerns. NMFS is implementing this extension of an emergency action to continue to authorize action to prevent any potential health issues caused by spreading the COVID-19 virus to fishermen, observers, technicians, and other persons involved with observer coverage. Any delay of implementation of this extension could result in public health and safety issues during this global pandemic. In addition, this extension is needed to address potential disruptions in observer and technician availability due to health, training or travel issues or COVID-19-related guidance, requirements, or restrictions.

For the reasons stated above, the AA also finds good cause to waive the 30-day delay in effective date of this temporary rule under 5 U.S.C 553(d)(3).

Because prior notice and opportunity for public comment are not required for this temporary rule by 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable.

Dated: September 15, 2020.

Samuel D. Rauch III,
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

